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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JEREMAINE PERRY,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS
FOR THE SOUTHERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

I. Whether a 15 year old defendant's 5th Amendment rights against self-incrimination and his 6th Amendment rights to effective representation were violated by the evidentiary use of incriminating statements taken during an interrogation without Counsel's presence and after Counsel had left his juvenile client alone with interrogating officers.

II. Was defendant denied his due process right to a conviction based only on proof beyond a reasonable doubt where reasonable doubt was defined in jury instructions as requiring only that the jury be firmly convinced of defendant's guilt

III. (a) Whether the attorney-client privilege as to communications between an attorney and his juvenile client is waived merely by the presence of the juvenile client's parents during the communications;

(b) Whether the unilateral decision by Counsel to disclose his juvenile client's confidential communications to the prosecutor mandates a bright line rule of conviction reversal to protect such violations of a defendant's rights under the 6th and 14th Amendments to the U.S. Constitution.

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PETITION FOR WRIT OF CERTIORARI

Jeremaine Perry respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Southern District in this case.

OPINION BELOW

The Opinion of the Missouri Court of Appeals Southern District is published as State v. Perry, 954 S.W.2d 554 (Mo. App. 1997). It is reproduced in the Appendix at App. ii. The Order denying Motion for Rehearing or Transfer to the

Missouri Supreme Court is reproduced in the Appendix at App. xliii. The Order of the Missouri Supreme Court refusing transfer is reproduced in the Appendix at App. xlv.

JURISDICTION

The Order of the Missouri Supreme Court denying transfer was issued November 25, 1997. This Petition is being filed within 90 days of that Order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 5th Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capitol or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

This Case also involves the 6th Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury in the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was arrested on January 7, 1993, detained

without bond. The Order certifying Petitioner for trial as an adult was not entered until January 19, 1994, and over 3 ½ years elapsed before the trial of the case on September 3, 1996.

Petitioner was interrogated four times and signed a statement verification all without the presence of an attorney. Two of the interrogations took place after counsel was retained and it was after counsel was retained that inculpatory statements were elicited and utilized both in the Juvenile Court hearing and as evidence in the murder trial. The interrogation on January 4, 1993, took place totally in counsel's absence though the authorities knew counsel had been retained.

The January 7, 1993, interrogation took place after the right to counsel had been invoked. Counsel appeared with Petitioner but left thereafter, leaving Petitioner alone with the interrogating officers. Despite counsel's absence, Petitioner was solicited to answer further questions. It is incriminating responses that formulated the basis for his conviction as there was no physical evidence at all to connect him with the death of his grandfather. In fact, Petitioner's confession was contrary to the physical facts. It is also of note that Petitioner, just after the incident, was tested for gun powder residue with negative results.

It was the same attorney who left Petitioner alone for interrogation on January 7, 1993, who thereafter provided confidential attorney-client information to the prosecutor handling Petitioner's trial. Information concerning statements to his attorney about the death of his grandfather were freely turned over totally without Petitioner's consent, knowledge, or waiver of his attorney-client privilege. While his former attorney did not testify in the trial, he was listed as a potentia witness, which had a definite effect on trial strategy and a chilling effect on Petitioner testifying in his own defense.

The instructions given to Petitioner's trial jury defined proof beyond a reasonable doubt as requiring nothing more than that the jurors be "firmly convinced" as to Petitioner's guilt of the crime charged to return a verdict of guilty. The jury convicted Petitioner of second degree murder and sentenced him to life imprisonment. Petitioner still awaits some semblance of due process and fairness to be meted out.

REASONS FOR GRANTING THE WRIT

1. The right to be free from self-incrimination is one of the most fundamental constitutional rights an accused has. An involuntary statement affects the integrity of the fact finding process in court. Thus the requirement for adequate warnings is to both protect against self-incrimination and ensure the fairness of the judicial proceedings. Miranda v. Arizona, 384 U.S. 436, 466 (1966). With regard to juveniles, this Honorable Court has recognized that they should not be judged by the more exacting standards of adults and further that the Court must provide special protections to ensure that admissions of juveniles are free of coercion and any alleged waivers of rights are freely, knowingly and intelligently made. Haley v. Ohio, 332 U.S. 596, 599 (1948). This Honorable Court has held that with regard to statements by juveniles, protection is not confined merely to assurance they are not obtained without coercion or suggestion. Indeed, voluntariness of a juvenile's statement additionally requires that it is not the product of ignorance of rights, fright or despair. In re: Gault, 387 U.S. 1, 55 (1967).

Petitioner Jeremaine Perry, a 15 year old child with an I.Q. of 80 and the emotional maturity of an 11 year old was questioned by both a detective and a juvenile officer about his complicity in his grandfather's death on four separate occasions. On January 14, 1993, after an attorney had been retained by Petitioner's parents, Petitioner was interrogated without the presence of counsel. Again on January 7, 1993, Petitioner was interrogated by a detective and juvenile officer. Petitioner appeared for the interrogation with counsel by counsel left the interrogation and incriminating statements continued to be taken. Statements obtained during the period of time that this 15 year old boy was without counsel were used in Petitioner's trial. The custodial nature of this interrogation

was clearly shown by the statements of the detectives that Petitioner was restrained from leaving and in all respects then in custody.

This Honorable Court some 29 years ago Orozco v. Texas, 394 U.S. 324 (1969) clearly held that Miranda warnings were required when a defendant was questioned, even in his own home, if he was not free to leave. Indeed, the subjective view of the interrogating officer are relevant as to custody, where as here, his intent is conveyed by word or action to the subject. Stansbury v. California, 511 U.S. 318, 321 (1994).

Petitioner clearly invoked his right to counsel on January 7, 1993, and counsel appeared at the place designated for the interrogation. Once counsel left and this 15 year old child was alone with the detective, this Court has clearly held that there can be no further interrogation without counsel. Edwards v. Arizona, 451 U.S. 477 (1981). Interrogation of this 15 year old child in his counsel's absence was clearly a 5th Amendment violation. Petitioner, at the age of 15 with the maturity level of an 11 year old was totally unable to comprehend the significance of his Constitutional rights in order to make a free choice relative to those rights. Haley v. Ohio, 332 U.S. 596 (1948). In any event, once the right to counsel has been invoked, even an opportunity to consult with counsel does not permit a resumption of the interrogation. Minich v. Mississippi, 498 U.S. 146 (1990).

Given this Petitioner's age of 15, his I.Q. of 80, his psychological immaturity as that of an 11 year old, the fact he was unable to leave, the abandonment by his counsel, and the absence of his parents, it could not be more clear that this resumed interrogation after Petitioner's counsel left was overtly coercive and any statements made should have been excluded from evidence. Colorado v. Connelly, 479 U.S. 157, 163 (1986). Given the fact that there was no physical evidence

connecting Petitioner with his grandfather's death, the impact of these coerced and involuntary confession type statements taken after invocation of the right to counsel by Petitioner could never be deemed harmless. The statements made the conviction and the conviction was fatally flawed.

This Honorable Court has no obligation under the Constitution and case law precedent to make a clear statement. The rights of this child were blatantly abused and due process of law mandates a reversal. This 15 year old child was convicted of murder and sentenced to serve his life in prison based upon statements made while he was in a coercive, custodial atmosphere having retained counsel and having invoked his right to same but having been abandoned and left by counsel to fend for himself. For this Honorable Court to fail to remedy this problem under the protections of the 5th and 6th Amendments takes all meaning from said protected rights.

2. Petitioner, a then 15 year old child, with an I.Q. of 80 and an emotional level of an 11 year old, was convicted of second degree murder with regard to the death of his grandfather. The jury that sentenced this child to life imprisonment was allowed to find guilt beyond a reasonable doubt based on nothing more than being "firmly convinced" of the defendant's guilt of the crime charged.

This Honorable Court some 28 years ago firmly declared that the due process clause of the U.S. Constitution requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. In re: Winship, 397 U.S. 358, 364 (1970). Some 20 years later, it was stated in Cage v. Louisiana, 498 U.S. 39, 41 (1990) that in a state criminal trial, the due process clause of the 14th Amendment protected all those accused of a crime against a conviction except by proof beyond a reasonable doubt of every

fact necessary to constitute the crime for which he was charged. The instruction in Petitioner's case indicated that the jury would find the defendant guilty if firmly convinced he was guilty of the crime charged and not "every element of the crime" and "every fact" necessary to constitute the crime charged. It is clearly deficient in the due process protections.

Petitioner's instruction defined "reasonable doubt" as nothing more than the jury being firmly convinced. In considering criminal instructions and instructional definition, this Honorable Court has said consideration is based on how reasonable jurors could have understood the charge. Frances v. Franklin, 471 U.S. 307, 316 (1985). In assessing what the reasonable lay person on a jury could understand from the reasonable doubt definition of "firmly convinced", a dictionary definition is most applicable. Webster's Third New International Dictionary (1996) equates the term firmly convinced with "a strong belief".

Thus, the Petitioner's jury could very easily draw power to convict beyond a reasonable doubt based upon a "strong belief" of guilt. A strong belief is simply insufficient to meet the burden of proof required by the due process clause and this Court's holding in Cage v. Louisiana, supra. In fact, the very term of "strong belief" to define reasonable doubt caused reversal in United States v. Purvis, 21 F.3rd 1128, 1129-30 (D.C. Cir. 1994).

Where, as in Petitioner's case, a jury instruction issued that erroneously defines reasonable doubt, such error is never harmless and must always invalidate the conviction. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993). The instruction utilized in the Circuit Court to define reasonable doubt and approved by the Missouri Court of Appeals allows for a finding of guilt based upon a degree of proof less than that required by

the due process clause of the 14th Amendment and the holdings of this Honorable Court.

The time has come for this Honorable Court to protect against erroneous definitional usages of reasonable doubt in state criminal courts to defy and undermined the right to the full protection of the 14 Amendments mandate that allows for a finding of guilt with adequate proof of every fact and element of the charge. A Constitutional cease and desist against convictions that take away a young child's life based on nothing more than a jury who is firmly convinced or has a strong belief.

3. This Honorable Court has long recognized the importance of the attorney-client privilege. Upjohn v. United States,409 U.S. 383 (1981). The privilege is founded upon the necessity, in the interest of justice, to permit individuals the aid of persons knowledgeable in the law, which assistance can only be safely availed when free from the apprehensions or consequences of disclosure. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

The attorney-client privilege has its roots in early English common law and is the most ancient of the privileges as for confidential communication. 8 Wigmore, Evidence Section 2290 (1961). This Honorable Court has held that the privilege rests on the need for counsel to know all that relates to the client's position in the matter if the lawyers professional mission is to be carried out. Trammel v. United States, 445 U.S. 40, 51 (1976). It is the client's ability to believe that an attorney is representing him that provides the basis for the privilege. McCormick on Evidence Section 88 (3rd Ed. 1984).

As of January 4, 1993, Petitioner's parents had retained an attorney, said attorney was rendering legal advice and had contacted the Juvenile Court as counsel for Petitioner. Prior to

the trial of this case and subsequent to the abandonment of Petitioner while in the throes of a police interrogation and after new counsel had entered an appearance on behalf of Petitioner, Petitioner's first counsel and the prosecutor unilaterally decided, without seeking the consent of the Petitioner (client) or even seeking direction by the trial court, that it was appropriate for counsel to disclose any and all statements made by Petitioner while his client at times when Petitioner's parents were present.

Missouri courts have long recognized the importance of a parent's presence during critical stages of a juvenile's case. Minors not always being able to access or understand their right adequately has caused this Honorable Court to understand the importance and necessity of parental presence. Gallegos v. Colorado, 370 U.S. 49, 54-55 (1969). Accord is In re: Gault, 387 U.S. 1, 33 (1967).

Petitioner's first counsel was listed as a trial witness for the state. It was the state's position, without authority, that the parental presence waived the attorney-client privilege to Petitioner's inculpatory admissions to his attorney. Thus Petitioner's attorney was thought to be a competent witness. While no Missouri cases speak to this point, the cases of Rosati v. Kuzman, 660 A.2d 263 (R.I. 1995) and United States v. Bigos, 459 F.2d 639 (1st Cir. 1972) clearly hold the parental presence does not destroy the attorney-client privilege. The parents in this Petitioner's case served essential functions as confidants and advisors to their 15 year old son who had a maturity level of 11 years old and an I.Q. of 80.

Counsel's communication of privileged communications to the prosecutor violated Petitioner's fundamental rights with regard to attorney-client privilege confidentiality, rendered the trial fundamentally unfair, and prejudicially chilled the defendant's exercise of his right to

testify in his own defense. The betrayal of Petitioner's confidence impugnes the integrity of the legal process and requires a new trial.

It is imperative that this Honorable Court utilize its powers to salvage this young boy's rights to reinstate the blatant impunity given the right to a fair trial with due process as set out in the 14th Amendment of the U.S. Constitution. A bright line rule must be made in such critical affronts to the rights of such juvenile clients, especially where as here the violation of the privilege affected the juvenile's exercise of his testimonial rights.

CONCLUSION

For all the foregoing reasons the Petition for Writ of Certiorari should be granted thereby causing this Honorable Court to review the Opinion and Judgment by the Missouri Court of Appeals, Southern District, affirming Petitioner's conviction and sentence to life imprisonment.

Respectfully submitted,

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